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No. 06-1456

IN THE

Supreme Court of the United States

HUMBERTO FIDEL REGALADO CUELLAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether merely hiding funds with no design to create the appearance of legitimate wealth is sufficient to support a conviction for money laundering under 18 U.S.C. § 1956(a)(2).

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, en banc, is reported at 478 F.3d 282 and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-44a. The panel decision is reported at 441 F.3d 329 and is reprinted at Pet. App. 45a-56a. The district court's judgment is unreported and is reprinted at Pet. App. 57a-62a.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

The judgment of the en banc United States Court of Appeals for the Fifth Circuit was entered on February 2, 2007. The petition was filed on May 3, 2007, and it was granted on October 15, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The money laundering statute at issue, 18 U.S.C. § 1956, is reproduced in the appendix to the petition. Pet. App. 63a-74a.

STATEMENT OF THE CASE

The question in this case is whether the mere act of hiding the proceeds of unlawful activity while transporting those proceeds suffices to establish the federal statutory crime of concealment money laundering under 18 U.S.C. § 1956(a)(2). According to the decision below, the answer to that question is yes. Pet. App. 13a ("simply taking steps to hide il-

licit funds is sufficient"). But according to the text, background, and purpose of the statute, as well as the rule of lenity that informs its construction, the answer must be no – proof that a defendant took steps to keep illicit funds hidden while transporting them establishes only that the money was *hidden*, not that it was *laundered*. As the Government concedes, the statute plainly requires evidence sufficient to establish not just that the money was concealed during transportation, but that the "design" of the transportation – i.e., its purpose – was to *result* in the prohibited concealment. But contrary to the Government's submission, the intended "concealment" prohibited by the statute means more than intent merely to hide the money itself at the end of the journey – one does not "launder" money by secreting it in a closet or burying it in mason jars. Instead the statute requires proof that the defendant sought to *cleanse the money of its taint of criminality* by concealing certain *attributes* of the money that expose its illegitimacy. Absent evidence distinctly establishing that particular unlawful purpose of the transportation, proof that a defendant kept illicit funds hidden while transporting them cannot suffice to sustain a money laundering conviction. Because the evidence here shows only that petitioner Cuellar hid the money during transport – and discloses nothing about the purpose for which it was being transported – his money laundering conviction must be reversed.

A. Statutory Background

The principal federal money laundering statute, 18 U.S.C. § 1956(a), includes separate transaction

and transportation paragraphs, which provide in pertinent part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> * * *
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
>
> * * *
>
> shall be sentenced to . . . imprisonment for not more than twenty years . . . .
>
> * * *
>
> (a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States –
>
> * * *
>
> (B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity

> and knowing that such transportation, transmission, or transfer is designed in whole or in part –
>
> > (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;
> >
> > * * *
> >
> > shall be sentenced to . . . imprisonment for not more than twenty years . . . .

18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i). Each provision also includes its own distinct "promotion" prong, which makes it a crime to conduct a financial transaction involving illicit property or to transport illicit funds "with the intent to promote the carrying on of specified unlawful activity." *Id.* § 1956(a)(1)(A), (a)(2)(A).

B. Factual Background

The Stop, Search, and Arrest. Near sunset on the evening of July 14, 2004, Humberto Fidel Regalado Cuellar was heading south on Texas Highway 277. J.A. 13-14. He had just passed Eldorado, Texas and was approximately a hundred miles from his home in the border town of Acuña, Mexico. J.A. 15. Cuellar was driving well below the posted speed limit because his Volkswagen Beetle, a 1994 Mexican model manufactured with the engine in the back, was having mechanical difficulties. J.A. 13-14, 40, 73. Deputy Kevin Herbert of the Schleicher County Sheriff's Department in Eldorado was heading the opposite direction on Highway 277 when he noticed Cuellar's car traveling at a low speed and

saw it swerve onto the shoulder. J.A. 13-15. The deputy turned around and began to follow the vehicle. *Id.* Once behind the VW, he observed that it had no registration or license plate and so he pulled it over. *Id.*

Realizing Cuellar did not speak English, Deputy Herbert, who does not speak Spanish, summoned a bilingual state trooper. J.A. 15-17. While waiting for the trooper to arrive, however, Herbert continued his investigation. He asked for Cuellar's driver license and insurance in "the best Spanish [he] could do." J.A. 16-17. Cuellar provided his Mexican driver license. *Id.* Herbert then repeatedly requested proof of insurance but because of the "little problem understanding each other," Cuellar went to the front of the car and opened the storage trunk of the Beetle. J.A. 21-22, 35-36, 38-39. He then provided a stack of other paperwork from the vehicle. J.A. 20-22. The paperwork indicated that the car likely did belong to Cuellar: it included three Mexican permits to operate a vehicle without license plates, two of which were in Cuellar's name,[1] and a traffic ticket Cuellar received while driving the VW in Mexico four months earlier. J.A. 33-34, 48-49. However, Cuellar had also handed over tickets showing he had traveled through Texas by bus, not by car, in the past few days. He had left the day before from Del Rio (directly across the border from Cuellar's home in Acuña), ridden to San Antonio, then to Big Spring,

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[1] Cuellar testified at trial that he needed such permits because he was a small businessman who bought cars in the United States and sold them in Mexico on a regular basis. J.A. 72-73.

and finally to Amarillo, arriving early that morning of July 14. J.A. 20-25.

At this point, Trooper Danny Nuñez from the Texas Department of Public Safety arrived to continue the investigation in Spanish. J.A. 17. He asked about insurance and Cuellar stated that he did not have any proof of insurance with him. J.A. 17-18, 35-36. Nuñez noticed a bulge in Cuellar's left front pocket and asked what he was carrying. J.A. 37-38. Cuellar replied that it was money and identification. *Id.* When Nuñez asked how much money it was, Cuellar said $1,600.[2] J.A. 50-51. Cuellar then provided the roll of money to Nuñez at his request. J.A. 17-18, 37-38. Deputies Nuñez and Herbert claimed they could smell "raw" marijuana on it. J.A. 25-26, 38.

During further questioning, Cuellar provided details about his route around Texas, the ownership of the VW, and the source of the cash in his pocket. Nuñez claimed his suspicions were raised by purported inconsistencies in Cuellar's answers,[3] and by

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[2] According to the transcript from the videotape of the arrest admitted at trial, Cuellar responded that he had $1,600. J.A. 50-51. Trooper Nuñez testified that Cuellar first said $600, but when asked to state the amount again, he changed it to $1,600. *Id.*

[3] Cuellar said he was coming home from San Angelo where he had been shopping for a truck, and that he had been in Texas for three days. J.A. 17-18, 37-38. Trooper Nuñez noted that he thought this was strange because Cuellar had no luggage, clothing, or toiletries. J.A. 22, 43-44. Further, Cuellar did not mention going through Big Spring that day, but a fast food receipt found in his car indicated he had been there a few hours earlier. J.A. 18-21, 43-44.

the amount and odor of the money in his possession, and so instructed Herbert to summon a canine unit. J.A. 25-26, 38, 44-45. Herbert also called border patrol to check Cuellar's immigration status and found that he was a Mexican national with proper authority to cross the border. J.A. 26.

While waiting for the canine unit, the two officers started to search the vehicle with Cuellar's consent. J.A. 17-18, 25-25, 38-39, 44-45. They noticed several alterations to the VW: the fender walls had drill marks on them, the gas tank had been tampered with, the floors had new carpet, and the exterior had mud splashes that appeared to have been created by a machine. J.A. 24-25, 40-43. Further, there was white animal hair on the floorboard behind the back seat. J.A. 42-43, 57-58.[4] These observations led the officers to believe that the VW was being used, or had been used, to transport narcotics. J.A. 40-45.

Deputy Chatham of the Schleicher County Sheriff's Department and his dog arrived. J.A. 25-26, 44-45. The dog was trained to detect narcotics, and alerted on the driver's seat and on the back seat. J.A. 55-57.[5] Chatham started searching around the

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[4] Deputy Chatham testified that animal hair is used by couriers to disguise the odor of narcotics. J.A. 57-59. Cuellar stated the hair was from transporting goats in the car. J.A. 42-43, 57-58.

[5] The dog later alerted to the cash found in Cuellar's pocket when the officers placed it in the glove box. J.A. 56-57. But Deputy Chatham testified that a substantial amount of money in circulation has sufficient odor to cause a drug dog to alert. J.A. 61. He also testified that there was no way to tell how long ago the narcotics odor had affixed to the cash. J.A. 60-62.

rear of the vehicle. He pushed aside two speakers that were sitting behind the back seat, pulled the carpet away from the floor, and found a removable plate secured with Phillips-head screws. J.A. 27-30. He shined his flashlight under a raised area of the metal plate into a void between the engine compartment and the back seat. J.A. 27, 46-47, 54, 59-60. Seeing some duct-taped bundles, and assuming they contained narcotics, he immediately directed Deputy Herbert to handcuff and arrest Cuellar. J.A. 46-47, 59-60.

Law enforcement transported Cuellar and the VW to the Sheriff's office for further investigation. J.A. 27-28. Cuellar, not yet aware of the discovery of the bundles, was not allowed to call his family despite his pleas that if he did not do so by midnight, they would be "floating down a river." J.A. 49-50. The trooper and deputies proceeded to remove the metal plate, exposing seven bundles in a secret compartment. J.A. 29-30, 47. Each bundle contained approximately $10,000 in cash, wrapped first in a blue Wal-Mart shopping bag, then in silver duct tape, and finally marked with the bundle's dollar amount in black ink. J.A. 29-30, 47-48. In total, $83,235 was found and seized, including the cash found on Cuellar's person and that found in the compartment. J.A. 30-31.[6]

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[6] The night of the arrest, Deputy Herbert and the sheriff took the cash back to their office, photographed it, and placed it in the evidence vault. J.A. 32-33. The next morning they deposited it in their own Schleicher County account "so [they] weren't hanging onto all that money." J.A. 30-31. This act put the currency back into circulation and was done without first performing residue or any other tests on it (and incidentally,

C. Procedural Background

1. A Texas federal prosecutor secured an indictment against Cuellar for international money laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i). He was not charged with bulk cash smuggling, a crime that he conceded he committed, Pet. App. 30a n.10, and for which the maximum potential prison term is five years – fifteen years less than for money laundering, *see* 31 U.S.C. § 5332(a). The jury convicted Cuellar in October 2004.[7] Trial counsel filed a Rule 29(a) acquittal motion for insufficiency of the evidence at the close of the Government's case, J.A. 74, and filed a Rule 29(c) acquittal motion after trial. J.A. 3. Both were denied. The district court sentenced Cuellar to 78 months imprisonment in January 2005. Pet. App. 58a.

2. A divided panel of the Fifth Circuit reversed Cuellar's conviction. The court found that the Government failed to prove that Cuellar knew the transportation had been "designed to conceal." To commit money laundering under § 1956(a)(2), the panel held, the accused must know that an underlying purpose of the transportation is to conceal or disguise the nature, location, source, ownership or control of illegal

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without first removing the allegedly strong marijuana odor). J.A. 32-33. The seized cash was therefore unavailable as evidence at trial. *Id.*

[7] In addition to the testimony of the three law enforcement officers involved in the arrest, Special Agent Richard Nuckles of U.S. Immigration and Customs testified regarding drug trafficking operations, including the fact that they often involve the flow of cash proceeds from drug sales from the United States to Mexico. J.A. 65-66.

proceeds. Pet. App. 49a-50a. The panel majority held that the evidence failed as a matter of law to show that the transportation was designed to conceal the money's attributes, much less that Cuellar knew of any such design. *Id.*[8]

Holding that "concealment" must be construed the same way in transportation money laundering under § 1956(a)(2) as it is in transaction money laundering under § 1956(a)(1), Pet. App. 50a n.4, the panel found that the Government failed to meet its burden because it did not show that Cuellar knew of a design to "'create the appearance of legitimate wealth' by smuggling drug money across the border," *id.* at 51a-52a, even if it *did* show that Cuellar knew he was hiding drug money and that he was planning to drive it across the border, *id.* at 49a. Whereas hiding money during transportation to facilitate money's movement may amount to bulk cash smuggling under 31 U.S.C. § 5332(a), *id.* at 52a n.5, it does not evidence a plan to conceal the money on the other end as is required for money laundering, *id.* at 50a.

3. The Fifth Circuit granted the Government's petition for rehearing en banc. Judge Davis authored the en banc opinion, vacating the panel decision from which he had dissented and affirming Cuellar's conviction for money laundering. Pet. App. 1a-2a. The en banc court held that "simply taking

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[8] The panel specifically held that Cuellar lacked the requisite knowledge of any potential laundering: "Even if such evidence [of a design to conceal] had been presented, the government would also have had to show that Cuellar knew his actions were designed to help launder the money." Pet. App. 52a.

steps to hide illicit funds is sufficient to prove concealment" for international money laundering. *Id.* at 13a; *see id.* at 10a (concluding that the statute does not "requir[e] proof of a plan to conceal the funds once they reach the ultimate destination outside the country"). The mere fact that Cuellar had taken steps to conceal the funds in his car rather than transport them openly, the court held, sufficed for a money laundering conviction. *Id.* at 10-11a.

Judge Smith authored a vigorous dissent that Judges DeMoss and Dennis joined. The dissent insisted that the statute requires proof that defendant knew of a design to create the appearance of legitimate wealth, pointing to the statutory title, legislative history, case law, and interpretive canons, including the rule of lenity. Pet. App. 25a-39a. That design to conceal the money's illicit characteristics – and thereby to create the appearance of legitimate wealth – was absent here, even if Cuellar might have been charged with other federal crimes. Pet. App. 44a.

SUMMARY OF ARGUMENT

I. Merely hiding the proceeds of unlawful activity while crossing the U.S. border is not a money laundering offense. All available evidence, including the text, background, and purpose of the money laundering statute, compels the conclusion that it reaches only concealment that creates the appearance of legitimate wealth. This is how money laundering has traditionally and universally been understood, and this is how it is defined by the statute. Rather than criminalizing concealment of the bare existence of illicit proceeds, the money laundering statute specifically targets concealment of five attributes of

such proceeds that betray their illegitimacy. It is by concealing those attributes that criminal enterprises make their "dirty" proceeds appear to be innocently-derived funds, and thereby enjoy the profits of their illicit activities. Thus, when money is transported internationally for the purpose of cleansing it, a money laundering violation may be established. Absent evidence of such a purpose, however, no money laundering conviction can stand.

Congress clearly understood that § 1956(a) targeted traditional money laundering. The transaction provision of the statute was designed to punish and deter domestic transactions that remove the taint of criminality from the proceeds, and the transportation provision was added to intercept at the border those who would evade the transaction provision by smuggling their proceeds out of the country to be laundered abroad. The concealment element was considered necessary to ensure that the statute did not criminalize all international transportations of illicit proceeds. Moreover, Congress enacted an entirely separate statute to address bulk cash smuggling – the precise conduct for which Cuellar was convicted – in recognition of the fact that this conduct, without more, was *not* punishable as money laundering. It is thus clear that the money laundering statute requires proof of an intent to create the appearance of legitimate wealth. To the extent any doubt remains, the rule of lenity compels a narrow reading of the statute, resolving any ambiguities in favor of the petitioner.

II. The alternative interpretations suggested by the Fifth Circuit and the Government are untenable. The Fifth Circuit's conclusion that the concealment

element is satisfied by mere physical concealment in transit would turn the statute on its head, and criminalize concealment for the purpose of transportation rather than, as the statutory text requires, transportation for the purpose of concealment. The Government takes a different view – that a purpose to conceal is indeed required, but the concealment need be nothing more that hiding the money upon arrival and the purpose to conceal may be inferred simply because a defendant took "substantial" steps to conceal it en route. That reading is equally flawed, because in practice it means that all international transportation of proceeds would violate the statute.

III. Even if it were true that the a mere purpose to hide illicit funds upon arrival suffices to establish international money laundering, however, Cuellar's conviction would still have to be reversed because there was *no* evidence at trial suggesting that Cuellar was transporting the money so it could be secreted away in Mexico. To the contrary, the most plausible inference was that the purpose of the transportation was to *spend* the money, not conceal it.

For all of these reasons, Cuellar's conviction must be reversed.

ARGUMENT

I. UNDER 18 U.S.C. § 1956(a), PROCEEDS OF SPECIFIED UNLAWFUL ACTIVITY MUST BE CONCEALED BY CREATING THE APPEARANCE OF LEGITIMATE WEALTH

The Money Laundering Control Act of 1986 prohibits financial transactions involving the proceeds

of specified unlawful activity, as well as the international transportation, transmission, or transfer of such proceeds, "knowing" that the transaction or transportation "is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds." 18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i). The basic question in this case is whether that provision is satisfied by mere proof that the defendant concealed the *existence* of the proceeds by physically hiding them from public view, or whether it requires proof that the defendant knew the transportation was part of a plan to conceal those *attributes* of the proceeds that betray their illegitimacy, thereby making the proceeds appear legitimate. As demonstrated below, the statute's text, function, and purposes, as well as the rule of lenity – a crucial aid in the construction of any criminal statute – all compel the latter construction. *See Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (alterations and quotation omitted)).

A. Section 1956(a) Addresses The Specific Evil Of Money Laundering, Which Requires The "Cleansing" Of Illicit Money Or Property To Make It Usable

The statute at issue here criminalizes the act of "money laundering," as reflected in the titles of both the legislation, the Money Laundering Control Act of

1986, Pub. L. No. 99-570, 100 Stat. 3207, and the relevant code section, "Laundering of monetary instruments," 18 U.S.C. § 1956. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 483 (2001) (title of statute may "shed[] light on some ambiguous word or phrase in the statute itself" (internal citations and quotations omitted)). As a matter of plain English, to "launder" money "is to disguise illegally-obtained money by making it appear legitimate." Pet. App. 26a; *see* 8 *Oxford English Dictionary* 702 (2d ed. 1989) (to launder money is "to transfer funds of dubious or illegal origin, usually to a foreign country, and then later to recover them from what seem to be 'clean' sources"); *Black's Law Dictionary* 1027 (8th ed. 2004) (stating that money laundering is "[t]he act of transferring illegally obtained money through legitimate people or accounts so that its original source cannot be traced"); *accord United States v. Dimeck*, 24 F.3d 1239, 1247 (10th Cir. 1994) ("The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises."); *United States v. Majors*, 196 F.3d 1206, 1212 n.12 (11th Cir. 1999) ("The activity that Section 1956(a)(1)(B)(i) seeks to prevent is the injection of illegal proceeds into the stream of commerce while obfuscating their source.").

Money laundering generally involves "a three-step process: (1) the criminally derived money is 'placed' into a legitimate enterprise; (2) the funds are 'layered' through various transactions to obscure the original source; and (3) the newly laundered funds are integrated into the legitimate financial world in

the form of bank notes, loans, letters of credit, or other recognizable financial instruments." *Money Laundering*, 39 Am. Crim. L. Rev. 839, 840 (2002) (quotation omitted); *see* William R. Schroeder, *Money Laundering: A Global Threat and the International Community's Response*, FBI Law Enforcement Bulletin 2 (May 2001) ("FBI Bulletin"), *available at* http://www.fbi.gov/publications/leb/2001/may01leb.pdf.

The understanding that the criminal act of money laundering necessarily includes the *laundering* component – i.e., the "cleansing" of "dirty" funds or property to make them appear legitimate – has been uniformly acknowledged across the U.S. criminal law enforcement community. "Traditionally, U.S. law enforcement has viewed laundering as the 'washing' of illicit funds, through having the cash *appear to be legitimately produced profits from a 'clean' business . . . .*" *Current Problem of Money Laundering: Hearings Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 303 (1985) ("*Hearings*") (statement of Bonni G. Tischler, Dir., Fin. Investigations Division, U.S. Customs Service) (emphasis added). The U.S. Department of Justice has described it the same way: "Money laundering is defined as 'the process by which criminals or criminal organizations seek to disguise the illicit nature of their proceeds *by introducing them into the stream of legitimate commerce and finance.*'" Mark Motivans, Bureau of Justice Statistics, U.S. Dep't of Justice, *Money Laundering Offenders, 1994-2001*, at 1 n.1 (2003), *available at* http://www.ojp.usdoj.gov/ bjs/pubalp2.htm (quoting U.S. Dep't of the Treasury, 2000-2005 Strategic

Plan, at 1) (emphasis added). The President's Commission on Organized Crime, which spearheaded the effort to enact the current money laundering statute, likewise defined money laundering as "the process by which one conceals the existence, illegal source, or illegal application of income, *and then disguises that income to make it appear legitimate.*" President's Comm'n On Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions, And Money Laundering* ("*Cash Connection*") 7 (1985) (emphasis added).[9] The Government Accountability Office has similarly defined money laundering as "the process of disguising or concealing illicit funds *to make them appear legitimate.*" General Accounting Office, *Investigating Money Laundering and Terrorist Financing: Testimony Before the Subcomm. on Criminal*

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[9] The report offered examples of the types of activities a money laundering statute should reach, all of which involve efforts to legitimize the funds and make it more difficult for law enforcement to trace them to the underlying illicit activity:

> payments to the Gambino family that were transferred through three bank accounts, including one in Switzerland, then withdrawn and placed into a safe deposit box; secretion into Swiss bank accounts, by the head of the New Orleans family of La Cosa Nostra, of $1.8 million that had been extorted from the Teamsters; a drug trafficker's practice of making numerous small deposits, totaling over $500,000, into a casino account, gambling a small amount, and then withdrawing the balance from the account in the form of checks made out to third parties, which were deposited in a securities firm before withdrawal; and the Hell's Angels' use of drug proceeds to purchase, through front men, failing businesses and real estate to legitimize the cash.

Pet. App. 28a-29a.

Justice, Drug Policy, and Human Resources, H. Comm. on Gov. Reform (statement of Richard M. Stana, Director, Homeland Security and Justice Issues) (May 11, 2004), *available at* http://www.gao.gov/new.items/ d04710t.pdf. *See also* FBI Bulletin, *supra*, at 2 (money laundering is "the process used by criminals through which they make 'dirty' money appear 'clean'").[10]

The act of laundering illicit funds and property by making them appear legitimate is considered so problematic in criminal law enforcement because it both incentivizes and facilitates the underlying criminal schemes that produce the illicit gains. *See* FBI Bulletin, *supra*, at 3 ("laundering increases the threat posed by serious crime, such as drug trafficking, racketeering, and smuggling, by facilitating the underlying crime and providing funds for reinvestment that allow the criminal enterprise to continue its operations"). As the President's Commission on Organized Crime explained in its report to Congress urging the adoption of the current federal money laundering statute, the ability to make "cash generated by criminal enterprises appear to come from a legitimate form" is a necessary link in allowing organized crime to "flourish." *Cash Connection*, *supra*,

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[10] Money laundering is similarly defined by law enforcement officials in other countries. For example, the Interpol General Assembly's working definition of money laundering is "any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources." *Money Laundering: Funds derived from criminal activities*, http://www.interpol.int/Public/ FinancialCrime/MoneyLaundering/default.asp (last visited Dec. 5, 2007).

at 3. Its Chairman emphasized that "money laundering is the lifeblood of organized crime," and that depriving organized crime of "the ability to freely utilize its ill-gotten gains" would deliver "a crippling blow" to crime syndicates. Letter from Irving R. Kaufman, Chairman, President's Commission on Organized Crime, to Ronald Reagan, President of the United States (Oct. 1984) (reproduced in *Cash Connection* at iii).

In short, the fundamental policy concern underlying the money laundering statute is that many "criminal groups . . . could not reap the profits of their unlawful activity without the means to camouflage their proceeds to appear as though they came from legitimate sources and business investments." *Money Laundering Legislation: Hearing Before the S. Comm. on the Judiciary*, 99th Cong. 1 (1985) (statement of Chairman Thurmond). Absent "a means to convert its illicit earnings into other forms of wealth," in other words, a criminal organization "could not reinvest its illegal proceeds in ways that allow it to continue and expand its operations, and it could not so readily spread its corrupt influence." *Id.* at 74 (statement of David D. Queen, Acting Assistant Sec'y for Enforcement and Operations, Dep't of the Treasury). The money laundering statute was thus enacted pursuant to a "clear bipartisan recognition of the need . . . to aid law enforcement in eliminating the huge profits reaped by sophisticated money laundering techniques." *Id.* at 1 (statement of Chairman Thurmond).

B. The Text Of § 1956(a) Requires Proof Of "Laundering" As Traditionally Understood

1. In the Money Laundering Control Act as it was finally enacted, Congress criminalized two closely related types of conduct: the laundering of illicit property through "financial transactions," 18 U.S.C. § 1956(a)(1), and the transfer or transportation of illicit funds from the United States to a foreign country (or vice versa), so that they can be laundered elsewhere, *id.* § 1956(a)(2).

The two provisions of the statute criminalize different acts – transactions versus international transportation – but otherwise have materially identical elements, as pertinent here:

(1) The defendant must "know[]" the property or funds "represent[] the proceeds of some unlawful activity." *Id.* § 1956(a)(1), (a)(2)(B).

(2) The property or funds must in fact represent "the proceeds of specified unlawful activity," *id.* § 1956(a)(1), (a)(2)(B)(i) – i.e., specific offenses listed in § 1956(c)(7).

(3) The defendant must "know[]" that the transaction or transportation is "designed in whole or in part" to "conceal or disguise [1] the nature, [2] the location, [3] the source, [4] the ownership, or [5] the control of the proceeds of specified unlawful activity." *Id.* § 1956(a)(1)(B), (a)(2)(B)(i).

The final element is the crucial "laundering" requirement – the transaction or transportation must be "designed" to "conceal or disguise" not merely the proceeds themselves, but particular *attributes* of il-

licit proceeds that would reveal them to be illicit. "The statute's focus is on these characteristics of illegal proceeds because they are the characteristics which, when concealed or obliterated, allow illegal proceeds to be passed into commerce as legitimate proceeds more easily." *Dimeck*, 24 F.3d at 1246. By concealing or disguising those attributes that would expose the illegitimacy of the funds, the type of transaction or transportation prohibited by the statute will necessarily have the effect of making the funds appear to be legitimate. Section 1956(a) thus fulfills the statute's aim of prohibiting the *laundering* of illicit money or property – rather than merely secreting it from view – so that criminal enterprises cannot make them usable for purpose of profit or reinvestment in further criminal activity.

2. This straightforward reading of the text of § 1956(a) is confirmed by its overall structure. As noted, the provision addresses two types of conduct involving illicit proceeds – financial transactions and international transportation. The "transaction" provision plainly can apply only to transactions designed to make property appear legitimate, because that is logically the *only* way a transaction can "conceal or disguise" the relevant attributes of illicit property. A transaction is not a tangible opaque thing, like a vault or a wall, that can be employed to hide money or property from prying eyes. It is impossible to conceal or disguise the *existence* of money during a transaction – the money or property remains as plain to see physically as it ever was. A transaction thus can "conceal" property only by disguising its ownership, location, control, etc., such that the property appears to be the product of le-

gitimate commercial activity. *See* FBI Bulletin, *supra*, at 3 (describing use of "layering" transactions "to increase the difficulty of tracing the proceeds back to its illegal source"). Numerous cases decided under § 1956(a)(1) illustrate this point.[11]

The same must be true for the acts of concealment or disguise by international transfer or transportation criminalized by § 1956(a)(2). The two provisions use identical language – to be unlawful, both the transaction and the transportation must be "designed in whole or in part" to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(B)(i), (a)(2)(B)(i). If

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[11] Merely transferring illicit funds from one account to another, *United States v. Esterman*, 324 F.3d 565, 570-72 (7th Cir. 2003), or writing checks on an account with illicit funds, *United States v. McGahee*, 257 F.3d 520, 528 (6th Cir. 2001), cannot constitute money laundering because neither activity does anything to conceal or disguise the illegitimacy of the funds. Likewise, merely *spending* the proceeds of illicit activity does not conceal or disguise their illegitimacy and thus does not constitute money laundering under § 1956(a)(1), as the Government concedes. U.S. Br. Opp. 14; *see United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999) ("Joining a number of other circuits, we hold that Subsection (i) of the money laundering statute does not criminalize the mere spending of proceeds of specified unlawful activity."); *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1474 (10th Cir. 1994) ("If transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute."); *see also United States v. Corchado-Peralta*, 318 F.3d 255, 259 (1st Cir. 2003); *United States v. Dobbs*, 63 F.3d 391, 398 (5th Cir. 1995); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996); *Majors*, 196 F.3d at 1213.

the "conceal or disguise" element under § 1956(a)(1) requires proof that defendant knew of a design to make the property appear legitimate, the same words – "conceal or disguise" – must mean the same thing under § 1956(a)(2). *See Powerex Corp. v. Reliant Energy Servs.*, 127 S. Ct. 2411, 2417 (2007) ("A standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning."); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) ("the normal rule of statutory interpretation [is] that identical words used in different parts of the same statute are generally presumed to have the same meaning"); *see also United States v. Ness*, 466 F.3d 79, 81 n.1 (2d Cir. 2006) (applying rule to § 1956(a) because "the relevant concealment language is identical for both provisions"), *pet. for cert. filed*, No. 06-1604 (June 1, 2007); *United States v. Johnson*, 440 F.3d 1286, 1291 n.4 (11th Cir. 2006) (same), *cert. denied*, 128 S. Ct. 262 (2007).

Identical words can have different meanings, of course, when it is apparent that Congress used them in different contexts to achieve different objectives. But here there is absolutely no indication that Congress intended to address distinct evils in the two provisions, rather than two means of achieving the same criminal end – i.e., the cleansing of proceeds to make them usable by the criminal organization. In fact, the transportation offense was added essentially to fill a gap left by the transaction provision in achieving that goal. To avoid U.S. law enforcement, money launderers "frequently use . . . offshore banks because of the difficulty in obtaining information to identify ownership interests and in acquiring ac-

count information from them." FBI Bulletin, *supra*, at 3; *see* 2007 National Money Laundering Strategy ("2007 Strategy") at 5, *available at* http://www.ice.gov/doclib/pi/financial/2007nmls.pdf (explaining problem of "criminal proceeds . . . leaving the United States as illicit bulk cash and reentering the country as seemingly legitimate funds")[12]; *see id.* ("Criminals facing barriers to money laundering at banks and [money service businesses] in the United States may attempt to smuggle cash to foreign financial institutions."); *see also, e.g., United States v. Kramer*, 73 F.3d 1067, 1070 & n.4 (11th Cir. 1996). Indeed, Congress recognized at the time of the statute's enactment that "the physical transportation of cash out of the country" is "the most common way in which money laundering is initiated." H.R. Rep. No. 99-855, at 15 (1986). The transportation provision effectively allows law enforcement to police these foreign money laundering transactions at the border. In *both* situations, however, Congress's sole concern

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[12] The 2007 Strategy paper describes some of the various ways smuggled cash is cleansed before being returned to the economy. *See* 2007 Strategy at 51 ("Bulk cash once it crosses the southwest border can take a number of routes, including: Individuals depositing the cash into Mexican banks or *casas de cambio* and then wiring it back into the United States; Complicit Mexican financial institutions repatriating the cash to the United States via cash couriers or armored cars, depositing the funds into the correspondent accounts; Smugglers moving the money on to Venezuela, Panama, Costa Rica, or other Latin American countries where it can be used to pay for goods – both legitimate and illicit – for the black market in Colombia; and, Individuals moving the funds to offshore jurisdictions with heightened bank secrecy protections.").

was with the ultimate act of sanitizing the proceeds of illegal activity to remove its illicit taint.

Numerous cases decided under the transportation prong illustrate the type of international transfers and transportations properly criminalized under this section. A good example of a genuine international money laundering scheme is described in *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996). In that case, drug proceeds were converted into cashiers' checks that were then "sent to a shell company in Liechtenstein" and "transferred through other entities in other countries to further disguise the origin of the money." *Id.* at 1070. A domestic corporation was created "to receive the money after it was 'cleaned' by these transfers," and to use some of the funds to build a casino and a marina. *Id.* "The end result of these transfers and construction projects was that tracing the drug proceeds directly was prevented by the deposit of the cashiers' checks in foreign banks. And tracing from the construction projects to their source of financing would reveal only that [the corporation] had received a 'loan' from a foreign entity protected by bank secrecy laws." *Id.* at 1070 n.4.[13]

Other cases reflect similar uses of offshore transfers to conceal or disguise the illegitimacy of illicit funds. *See United States v. Anderson*, 371 F.3d 606, 608, 610 (9th Cir. 2004) (money transferred to foreign bank account and then wired back to a "secret

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[13] The defendant's conviction in *Kramer* was reversed because he was only found to have participated in a transfer of funds from Switzerland to Luxembourg, and the statute is limited to transfers to or from the United States. *Id.* at 1072.

account" in the United States); *United States v. Awan*, 966 F.2d 1415, 1418-19 (11th Cir. 1992) (cash obtained from drug deals was deposited in the accounts of front businesses in the United States and then wired to investment accounts in Panama belonging to shelf corporations); *United States v. Neal*, 2003 WL 24472513, at *1 (E.D. Va. July 31, 2003) (defendant transferred illegal funds into an account in Lichtenstein and then into a shell company in the British Virgin Islands).

Several cases involving the physical transportation of cash across U.S. borders (like this case) likewise reflect the use of such transportation to initiate or complete a broader scheme designed to make illicit proceeds appear legitimate (unlike this case). One court described as "typical money laundering" a defendant's conduct of "secretly [carrying] the cash or proceeds [of his theft] to the Cayman Islands where he formed a corporation under a false name, planned on depositing the money in bank accounts under different names in amounts calculated to avoid reporting requirements," and was only thwarted when "the remainder of the funds was stolen by a person to whom he planned to give his money in an attempt to make it untraceable." *United States v. Bockius*, 228 F.3d 305, 313 (3d Cir. 2000); *see United States v. Castaneda-Cantu*, 20 F.3d 1325, 1329 (5th Cir. 1994) (defendants collected cash from drug trafficking and weapons smuggling in U.S., wired equal funds to bank account of person who supplied the "dirty" proceeds, smuggled the proceeds across the border to Mexico, and then "generated a fictitious receipt for the money," which "created a paper trail that made it appear as if the

money going into [the cash supplier's] account originated" from legal activities); *United States v. Beddow*, 957 F.2d 1330, 1333 (6th Cir. 1992) (defendant traveled to Brazil with third party who acted as a "front man" to exchange drug money, in cash and traveler's checks, for emeralds that were to be resold in the United States).

Although it was decided nominally under § 1956(a)(1), the Tenth Circuit's opinion in *Dimeck* also provides useful guidance because it specifically addresses the relevance of concealment during the physical transportation of drug proceeds. The court found the evidence in that case to be insufficient to show the requisite design to conceal, even though the defendant had physically concealed the money during transportation, because he had not sought to "confuse or mislead anyone as to the characteristics" of the funds. 24 F.3d at 1245-46. As the court explained:

> The transportation of the money from Detroit to California in a box, suitcase, or other container does not convert the mere transportation of the money into money laundering. The existence of the money is, of course, concealed so that no explanation whatever need be offered to outsiders as to its attributes. The money laundering statute was designed to punish those drug dealers who thereafter take the additional step of attempting to legitimize their proceeds so that observers think their money is derived from legal enterprises. Rather, the couriers' role was simply to deliver the funds . . . as illegal funds.

Id. at 1247 (citations omitted). Because the defendant had not concealed the funds for the purpose of "allowing these proceeds to enter into legitimate commerce," the money laundering conviction was reversed. *Id.* at 1246-47.

There is likewise no evidence – nor even any argument – here that Cuellar knew the transportation was designed to sanitize the money so that it could enter legitimate commerce. Accordingly, his conduct does not fit within the criminal offense Congress defined in § 1956(a)(2).

C. The History Of § 1956(a) Confirms That The Government Must Show That The Defendant Knew Of A Plan To Create The Appearance Of Legitimate Wealth

Section 1956(a)'s legislative history confirms that secretly transporting illicit money is not *ipso facto* money laundering absent proof that the defendant knew that one purpose of the transportation was to launder the money by making it appear legitimate. Indeed, the decision below not only is at odds with Congress's clear purpose in enacting the statute, but it actually imprints onto the statute a reading that Congress specifically rejected as overly broad.

1. As already explained, money laundering as a specific activity and problem was widely recognized and clearly understood by Congress at the time it enacted the Money Laundering Control Act. The Report of the President's Commission elaborated the problem in detail, and numerous witnesses at hearings confirmed the nature and harms of money laundering with acute specificity. The legislative record was unambiguous: Congress was concerned with the

processes by which criminal organizations gained access to their illegitimate wealth by removing any appearance of illegality from their proceeds, thereby underwriting and creating incentives for their illicit activities. *See supra*, at 18-20.

Despite the consensus built around a need to prohibit the cleansing of dirty money, the bills initially proposed were sharply criticized as being both too narrow and overly broad.[14] On the one hand, witnesses raised concerns that none of the proposals would prohibit the international transportation of illicit funds. The fear was that any statute that did not expressly prohibit the international transfer and transportation of illegal money would allow launderers to carry money to bank secrecy countries or overseas crime networks, thereby cleansing with impunity beyond the view and control of federal authorities. *See, e.g., Hearings*, at 302-12 (Tischler statement).

In order to fill that gap, the versions reported out of both the House and Senate committees included a second prong for the international transportation of illicit funds, which eventually became § 1956(a)(2). That provision reflected Congress's recognition that "the physical transportation of cash out of the coun-

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[14] For the text of the proposals initially introduced, see Money Laundering Act of 1985, H.R. 1367, 99th Cong. § 101(a) (1985) (Commission's proposal); Money Laundering and Related Crimes Act of 1985, H.R. 2786, 99th Cong. (1985); Money Laundering Crimes Act, S. 572, 99th Cong. (1985); Money Laundering and Related Crimes Act of 1985, S. 1335, 99th Cong. (1985); and Money Laundering Crimes and Disclosure Act of 1985, S. 1385, 99th Cong. (1985).

try" is "the most common way in which money laundering is initiated." H.R. Rep. No. 99-855, at 15 (1986). The transportation offense thus was designed to cover "situations in which money is *being laundered* by transferring it into the United States as well as those in which it is *being laundered* by transferring it out of the United States." S. Rep. No. 99-433, at 11 (1986) (emphases added). In other words, the transportation prong is designed to reach transportations that are necessary preludes to further laundering transactions.

On the other hand, members raised concerns that the proposals defined every transaction in illicit funds as money laundering, so long as the defendant knew the funds were dirty.[15] As the Chairman of the House Subcommittee on Crime observed, "an employee of General Electric who cashes his or her paycheck after receiving knowledge that General Electric has committed a major fraud of the U.S. Government" would be laundering money under those proposals because the employee would "know[] that the money was derived indirectly or in part from conduct which was illegal." *Hearings*, at 288 (statement of William J. Hughes, Chairman).

In order to refocus the statute on the *cleansing* of dirty funds, the Senate Judiciary Committee added the design-to-conceal element, as it currently exists, to both the transaction and transportation prongs. *See* S. Rep. No. 99-433, at 33-34. As the Senate Report explains, that element cabins the statute, nar-

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[15] Every proposal, except for H.R. 1474, also contained a separate promotion element, none of which required that the money represent the proceeds of unlawful activity.

rowing its focus to "the *core of money laundering* – transactions designed to conceal or disguise the nature, location source, ownership, or control of criminal proceeds, or to evade Federal or State cash reporting requirements." *Id.* at 10 (emphasis added).

As this history makes clear, § 1956(a) focuses squarely on the business of converting illicit money into seemingly legitimate forms – the lifeblood of organized crime. To accomplish that goal, § 1956(a)(1) prohibits the basic money laundering activity of conducting transactions in unlawful funds for the purpose of concealing the telltale characteristics of illicit property. Section 1956(a)(2) then fills a gap left by § 1956(a)(1) for international shipments of illegal cash which are the first, critical step in an international money laundering operation.

The statute having been expanded to reach both domestic and international money laundering, the design-to-conceal element limits its scope. The statute thus prohibits both transactions and transportations designed to make dirty money appear clean, but it does not create a general crime for all transactions or transportations involving illicit money, as initial proposals would have done.

By contrast, the reading adopted below would resurrect the overbroad proposals that Congress rejected. Virtually *every* transaction or transportation in illegal funds will involve some level of concealment and secrecy, lest the criminals expose their underlying criminal activity. *Cf. Grunewald v. United States*, 353 U.S. 391, 402 (1957) (defendants could not be convicted of conspiracy to conceal a conspiracy because "every conspiracy is by its very na-

ture secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world"). No functional distinction exists between a statute (such as those initially proposed and ultimately rejected) that prohibits any transaction or international transportation in illegal funds, and a statute (such as § 1956(a) under the Fifth Circuit's reading) that prohibits any transaction or international transportation in illegal funds that involves some level of secrecy and concealment.

The decision below thus is not simply contrary to § 1956(a)'s language and structure; it actually reverses an explicit choice by Congress to focus the statute on money laundering as traditionally understood.

D. The Bulk Cash Smuggling Statute Provides Further Proof That International Transportation Of Illicit Proceeds Alone Does Not Constitute Money Laundering

Further evidence that the money laundering statute does not reach the mere international transportation of illicit proceeds is provided by the bulk cash smuggling ("BCS") statute. Enacted in 2001 as part of the USA PATRIOT Act, that statute makes it a criminal offense punishable by up to five years in prison to knowingly smuggle more than $10,000 in "currency or other monetary instruments" into or out of the United States "with the intent to evade a currency reporting requirement." 31 U.S.C. § 5332(a)(1). In sharp contrast to § 1956, the BCS statute does not criminalize concealment of specified attributes of the money, but rather criminalizes the act of concealing the existence of the money. *Id.*

(statute targets anyone who "conceals more than $10,000 in currency or other monetary instruments on the person of such individual or in any conveyance, article of luggage, merchandise, or other container").

The congressional findings written into the law enacting § 5332 make clear that the purpose of the statute was to target those who engage in precisely the activity for which Cuellar was convicted here. Congress determined that, as a result of the success of domestic anti-money laundering efforts, the smuggling of drug money out of the country in order to convert it into usable funds elsewhere was a growing problem. "In their effort to avoid using traditional financial institutions, drug dealers and other criminals are forced to move large quantities of currency in bulk form to and through the airports, border crossings, and other ports of entry where the currency can be smuggled out of the United States and placed in a foreign financial institution or sold on the black market." Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. 107-56, Title III, § 371(a)(2), (3) 115 Stat. 272, 336-37 (2001) (codified at 31 U.S.C. § 5332). In addition, Congress found that "the movement of large sums of cash" by itself had become "one of the most reliable warning signs of drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes." *Id.*

While Congress thus recognized that the act of secretly transporting large sums of cash outside the United States was often *part* of a broader money laundering scheme, the problem Congress perceived

was that that mere act itself was not already covered by existing laws, including the Money Laundering Control Act. *See* H.R. Rep. No. 107-250(I), at 37 (2001) ("under current law, the person transporting the currency may not be guilty of any money laundering offense"). As Congress recognized, "the only law enforcement weapon against such smuggling" at the time was 31 U.S.C. § 5316, which makes it an offense to transport more than $10,000 into or out of the United States without reporting the transportation to the Customs Service. H.R. Rep. No. 107-250(I), at 36; S. Hrg. 107-641, at 74 (September 26, 2001) (statement of Rep. Roukema) ("The existing laws governing bulk cash smuggling are totally inadequate. Presently, the only law enforcement weapon against bulk cash smuggling is Section 5316 of Title 31, U.S. Code. . . . H.R. 2922 will give law enforcement authorities a critical tool in disrupting the channels used by terrorists to finance their activities in the United States."). Congress therefore enacted the BCS statute to fill the gap and "make the act of smuggling bulk cash itself a criminal offense." USA PATRIOT Act § 371(b); *see* 147 Cong. Rec. S109909-02, S11034 (2001) (statement of Sen. Levin) ("For the first time, bulk cash smuggling over U.S. borders will be a prosecutable crime, and suspect funds will be subject to forfeiture proceedings."); 2007 Strategy at 53 (noting that before enactment of the BCS statute, "an individual smuggling bulk quantities of cash was subject to criminal penalties and/or jail time or civil penalties" only for failing to satisfy the report-

ing requirements of § 5316 and 31 C.F.R. § 103.23) (footnotes omitted).[16]

Notably, Congress recognized that the bulk smuggling activity criminalized by the BCS statute involved precisely the kind of conduct for which Cuellar was prosecuted here. "Smugglers use all available means to transport the currency out of the country," the House Report observes, "from false bottoms in personal luggage, to secret compartments in automobiles, to concealment in durable goods exported for sale abroad." H.R. Rep. No. 107-250(I) at 36. "The common elements in these [bulk cash smuggling] cases include the transportation of a large quantity of currency, bundled in street denominations and concealed in a vehicle, on an interstate or other major highway, by a person or persons who disclaim any knowledge of where the currency came from or where it is to be delivered." *Id.* at 37. The BCS law was plainly enacted to address the conduct at issue here; the Money Laundering Control Act just as plainly was not.

Cases prosecuted under the BCS statute confirm the use of that statute to target the mere transportation – but *not* the actual laundering – of funds. In *United States v. Salazar*, 223 F. App'x 424 (5th Cir. 2007), for example, the defendant was stopped while attempting to drive into Mexico, and the Border Patrol Inspector found a trap door in the gas tank, con-

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[16] Although § 5332 does not require proof that the smuggled money is the proceeds of a specified unlawful activity, the statute plainly targets illicit proceeds. *See* 2007 Strategy at 50 ("law enforcement believes much, if not most, of the seized cash does represent drug proceeds").

cealing $418,300 in U.S. currency inside a plastic bag bundled with rubber bands. *Id.* at 425-26. The defendant was charged with and convicted of violating 31 U.S.C. § 5332(a) as well as currency reporting requirements – but not the Money Laundering Control Act. Another case described the arrest of three couriers on a jetway who were trying to board a flight from New York to Pakistan carrying $515,583 in U.S. currency concealed, among other places, in soap and toothpaste boxes. *United States v. Khan*, 497 F.3d 204, 206 (2d Cir. 2007). They were convicted of bulk cash smuggling under 31 U.S.C. § 5332(a), as well as various offenses relating to their failure to report the money they were transporting under 31 U.S.C. § 5316 – but not money laundering.

Finally, the differences Congress perceived between the problem of money laundering and the problem of bulk cash smuggling are reflected in the grossly disparate penalties Congress authorized for the two offenses. A person convicted of transporting illicit funds for the purpose of laundering them is subject to up to twenty years imprisonment, whereas a person convicted only of secretly transporting the same funds is subject to a maximum five years imprisonment. *Compare* 18 U.S.C. § 1956(a) *with* 31 U.S.C. § 5332(b)(1). The much more severe laundering penalty is plainly intended to punish a *certain type* of international money smuggling – i.e., smuggling that the defendant knows to be part of a larger scheme of laundering the money, thereby to facilitate and incentivize continuing illegal activities. Where the Government cannot make that specific showing, the BCS statute fills the gap, criminalizing the mere act of transporting bulk cash without re-

porting it, since such acts *may* be part of a larger laundering plan, just as they may only be part of the process for making payments in a chain of underlying criminal activity. Either way, interpreting the Money Laundering Control Act broadly to criminalize essentially the same conduct already addressed by the BCS statute would quadruple the maximum punishment for an act that is already punishable under the BCS statute – contrary to the gap-filling purpose for which the BCS statute was enacted and to the integrated punishment scheme Congress established. Congress cannot be presumed to have intended such an incoherent and irrationally harsh result.

E. If Any Room For Doubt Remained, The Rule Of Lenity Compels A Narrow Construction Of The Statute

Petitioner submits that the scope of § 1956(a)(2) is sufficiently clear from its text, structure, purpose, and history. But even if there were any doubt about its clarity, reversal would be compelled by the rule of lenity, "which demand[s] resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see Ratzlaf v. United States*, 510 U.S. 135, 147 (1994). Put differently, when a criminal statute is capable of more than one reasonable construction, the statute must be given "the more narrow reading of which it is susceptible." *James v. United States*, 127 S. Ct. 1586, 1603 (2007) (Scalia, J., dissenting); *see United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The rule of lenity thus shifts

the burden to the Government not only to show that its broader construction is reasonable, but also to exclude any reasonable possibility that the narrower construction reflects Congress's actual purpose. That is, where the "text, structure, and history fail to establish that the Government's position is unambiguously correct," the Court "appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). Application of the rule of lenity is particularly appropriate where, as here, the statute at issue is vulnerable to prosecutorial overreaching. *See United States v. Kozminski*, 487 U.S. 931, 952 (1988) (rule of lenity is intended "to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts").

As already shown, the text, structure, and history all fully confirm Congress's intent to criminalize only those international transportations of illicit funds that are designed to remove the taint of evident criminality from the funds. There certainly is no basis in those interpretive sources for concluding that either the Fifth Circuit's or the Government's position is unambiguously correct. To the contrary, both positions are quite incorrect, as the next section demonstrates. At the very most the Government can hope only to sow some ambiguity in the language of § 1956(a)(2), but that ambiguity must be resolved against the Government and in favor of Cuellar's position here.

II. THE COUNTER-THEORIES ESPOUSED BY THE FIFTH CIRCUIT AND PROPOSED BY THE GOVERNMENT ARE WITHOUT MERIT

The Fifth Circuit and the Government endorse conflicting theories of what the prosecution must prove to sustain a money laundering conviction under § 1956(a)(2). Neither is compelled by the text of § 1956(a)(2), and neither is consistent with the purpose Congress sought to achieve in enacting § 1956(a)(2).

A. The Fifth Circuit's Concealment-During-Transport-Only Theory Is Incorrect, As The Government Acknowledges

The Fifth Circuit held that "simply taking steps to hide illicit funds is sufficient to prove concealment" for international money laundering (Pet. App. 13a), and it expressly rejected the theory that § 1956(a)(2) "requir[es] proof of a plan to conceal the funds once they reach the ultimate destination outside the country" (*id.* at 10a); *see id.* at 16a (concealment may be accomplished simply by "successfully transport[ing]" proceeds to Mexico).

The Fifth Circuit's construction appears to rest on a simple misunderstanding of the word "design." *See* 18 U.S.C. § 1956(a)(2)(B)(i) (transportation must be "designed in whole or in part – (i) to conceal or disguise" certain attributes of the proceeds). As that court construes the word in this context, it essentially means *structure*, as in the "design" of a house. Because Cuellar's method of transportation was structured in such a way as to conceal the money – i.e., he drove a car reconfigured to keep the funds

hidden – the court concluded that he had "designed" the transportation to "conceal" the money.

It is clear, however, that Congress did not intend to use the word "design" in this static sense. An at least equally common understanding of "design" is *purpose* or *plan*, as in "[t]he money laundering statute was designed to punish those drug dealers who . . . attempt[] to legitimize their proceeds." *Dimeck*, 24 F.3d at 1247; *see American Heritage Dictionary of the English Language* 491-92 (4th ed. 2000) ("to have as a goal or purpose; intend"); *Webster's Third New International Dictionary of the English Language, Unabridged* 611 (1993) ("to plan or have in mind as a purpose: intend, purpose, contemplate"). Even the Government agrees that this is the sense in which "design" is used in § 1956(a). U.S. Br. Opp. 11 (money laundering "statute makes it an offense to transport money *for the purpose of* concealing or disguising it" (emphasis added)).

The Fifth Circuit's view that § 1956 criminalizes the mere act of concealing illicit funds during transport cannot be squared with the text, purpose, or history of § 1956(a). None of those indicators suggests Congress was concerned only with the hiding of cash during transport – to the contrary, that distinct concern was addressed later, by the BCS statute. *See* Part I.D, *supra*. The Fifth Circuit's construction does not even address the basic textual requirement that the transportation be designed to conceal certain attributes of the money, rather than the money itself. That is, the simple concealment of the existence of monetary instruments while in transit may facilitate the border-crossing, but it does not conceal any of the attributes Congress enumerated in the

money laundering statute. The proceeds are just as dirty upon arrival as they were at the start of their journey; they have only been physically relocated. *See Johnson*, 440 F.3d at 1291 (proceeds must be "better concealed or concealable after the [transportation] than before"); Pet. App. 15a. That relocation may satisfy the "international transportation" requirement of 1956(a)(2), but absent some plan to further conceal the money upon arrival it does not establish the "design to conceal" element of the statute.

The Fifth Circuit's reading also ignores the intent requirement specifically inserted by Congress to cabin the reach of the statute and thus prevent misuse by prosecutors. *See supra*, at 30-31. To conclude that secretive international transportation of illicit funds is money laundering is tantamount to saying that *all* international transportation of illicit funds is money laundering, since *everybody* who travels with cash (particularly illicit cash) conceals it some way, and those who are transporting large sums are likely to take extra precautions.

As the dissent below put it, "[t]here is a difference between concealing something to transport it, and transporting something to conceal it." Pet. App. 24a. The Fifth Circuit's view would criminalize the former, but the statute criminalizes only the latter.

B. The Government's Ultimate-Purpose-To-Conceal-Only Theory Is Also Incorrect

Although it concedes that a money laundering conviction requires proof that the illicit funds were transported for the purpose of concealing them, the Government's understanding and application of that

test reveals it to be the functional equivalent of the Fifth Circuit's flawed construction.

According to the Government, the transportation need only be designed to hide the funds at the end of the journey, not to create the appearance of illegitimacy. U.S. Br. Opp. 11. But the existence of that ultimate purpose to hide the funds at the destination, the Government contends, may be inferred from the mere hiding of funds en route, so long as the concealment was "elaborate" and not "minimal." *Id.* at 17; *see id.* ("degree of concealment" must be "significant"); *id.* at 11 ("the more convoluted the transaction, the easier it is to infer a design to conceal or disguise").

There are at least three problems with this formulation. First, nothing in the text of § 1956(a) supports an added "substantial or elaborate concealment" element. The statute refers only to a "design[]" to "conceal or disguise." Petitioner submits that in context "conceal or disguise" refers to concealing or disguising the *illegitimacy* of the funds, but there is no basis in the statute for understanding "conceal" to mean "substantially conceal."

Second, the Government provides no basis on which juries can distinguish minimal acts of concealment (not unlawful) from substantial acts of concealment (unlawful). Whether hidden in secret compartments, glove compartments, suitcases, boxes, money belts or wallets, no smart traveler keeps significant sums of money in plain view. In other words, hiding money is *how people travel with money*. And the more cash they are carrying, the more careful they are likely to be to protect it. The

blurry, unwritten line between minimal and substantial concealment gives judges and juries far too little guidance in identifying the acts worthy of lengthy criminal money laundering sentences. For the same reason, it also gives prosecutors far too much power to secure plea bargains for substantial prison time for what may not be money laundering acts at all.

Third, there is no basis for the Government's assumption that substantial concealment in transit proves that the transportation was undertaken for the purpose of concealment. Illicit funds are often carried in bulk amounts, and couriers would rarely be likely to carry such funds without some effort to secure them substantially, both from authorities and from other criminals. It simply is not rational to infer a further purpose of concealment at the destination from the mere fact that the money was hidden during transportation. Moreover, there are any number of reasons why one might secretly transport illicit money across the border that have nothing to do with concealment as an ultimate purpose. The money could be used to buy contraband, to hire prostitutes, to gamble, to pay organized crime protection money, to finance a vacation, or otherwise to be spent for personal benefit. In the case of drug money, the transport may be to purchase drugs or repay a drug supplier. Those purposes may be undesirable or unlawful for other reasons, but they do not evidence a "design to conceal" under any plausible definition.

The Government's theory, in short, gives juries little or no basis for distinguishing those acts of secretly transporting illicit funds internationally that

are prohibited by § 1956(a)(2) from similar acts that are not prohibited by § 1956(a)(2). It thus effectively expands the statute to impose lengthy terms of imprisonment for *all* acts of secretly transporting illicit funds internationally – *regardless of purpose*. That proposition cannot be reconciled with the text, function, or history of the statute, or with the separate existence of the BCS statute, which was enacted to address precisely those acts that cannot be proved to be part of a money laundering scheme.

III. BECAUSE THE GOVERNMENT OFFERED NO EVIDENCE OF A PURPOSE TO CONCEAL BY ANY DEFINITION, CUELLAR'S CONVICTION CANNOT STAND

Even if the statute could be read as allowing a conviction when the ultimate purpose of the transport is merely to hide the money in its final destination – and not necessarily to convert it into seemingly legitimate funds – Cuellar's conviction cannot stand because there was no evidence of either purpose here.

As the Fifth Circuit's opinion makes clear, the record evidence established nothing more than acts of concealment for transportation, not an act of transportation to conceal. The en banc majority pointed to four facts supporting the design-to-conceal element: (1) that Cuellar took steps to conceal marijuana odor on the cash; (2) the cash was wrapped in duct tape and covered in plastic bags and carpet; (3) the cash was placed in a hidden compartment; and (4) Cuellar had little information about the owner of the cash (other than the most revealing fact, i.e., his name). Pet. App. 11a. The first three certainly show

that the cash was concealed en route. They may also support an inference that the funds were illicit in some way. The fourth shows at most that the owner did not want to be associated with the funds and thus perhaps further supports the inference of illegitimacy. But even taken collectively, *nothing* about those facts demonstrates beyond a reasonable doubt that Cuellar knew the transportation was designed to conceal the cash upon its arrival in Mexico.[17]

Indeed, if any particular inference about the purpose of the transportation is reasonable, it is that the money was not supposed to be concealed, but *spent* in the furtherance of the underlying criminal activity. The Government's expert testified that Cuellar's behavior was that of a drug smuggling courier. J.A. 62-63, 65. In such an operation, he testified, the money hidden in a vehicle is intended to pay the drug supplier to whom it is owed. J.A. 65. In other words, by the Government's own account, a likely purpose of transporting the illicit funds was so that they could be spent as part of the underlying drug smuggling operation – not secreted away uselessly in Mexico. There most certainly was no evidence that the transportation was designed to cleanse the money of its criminal taint – if used to purchase drugs or repay a supplier in Mexico, the money would be (and would appear) just as illicit as the day it was bundled into Cuellar's car.

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[17] To the extent these facts might demonstrate concealment of certain attributes of the proceeds *during* transportation, they still say nothing about the ultimate purpose of that transportation – i.e., that the transportation was designed to conceal the proceeds at the end of the journey.

Because there was no permissible basis upon which the jury could find beyond a reasonable doubt that the transportation of illicit funds was designed for *any* purpose prohibited by § 1956(a), Cuellar's conviction must be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, and remand for the district court to enter a judgment of acquittal.

Respectfully submitted,

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